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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the offense of second degree burglary under Missouri law is a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 864 F.2d 625.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing was denied on March 7, 1989 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted in the Eastern District of Missouri on three counts of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1) (Supp. V 1987). In the district court, the government filed a pretrial "Notice of Punishment Enhancement" that notified petitioner that since his criminal record included two previous

convictions for second degree burglary under Missouri state law,[1] one previous state conviction for robbery, and two previous state convictions for assault, he was subject to the enhanced sentence of 15 years' imprisonment under 18 U.S.C. 924(e)(1) (Supp. V 1987) (Pet. C.A. Br. Add. A2, at 1-3).[2]

Petitioner was convicted on a plea of guilty to one of the three counts in the indictment.[3] At the sentencing hearing, petitioner contended that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others.[4]

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[1] Missouri state law defines second degree burglary as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein" (Mo. Rev. Stat. § 569.170 (1979)).

[2] The sentence enhancement provision of 18 U.S.C. 924(e)(1) applies to previously convicted felons who possess or receive a firearm in violation of 18 U.S.C. 922(g). Title 18, United States Code, Section 924(e)(1), provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

Title 18, United States Code, Section 922(g)(1), refers to any "convict[ion] in any court of a crime punishable by imprisonment for a term exceeding one year."

Title 18, United States Code, Section 924(e)(2)(B), provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[3] Under the plea agreement between petitioner and the government, petitioner agreed to plead guilty to one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). The government agreed to move to dismiss the remaining two counts at the time of sentencing. Pet. App. 19a-22a.

[4] At the sentencing hearing, the government agreed with petitioner that the district court should not consider one of the two state assault convictions in applying the enhancement provision since that conviction had not been verified. Pet. App. 12a-13a. Petitioner also conceded that his remaining state assault conviction and his robbery conviction each qualified as a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii). Pet. App. 13a; Pet. C.A. Br. 5; Pet. Mot. to Strike Notice of Punishment Enhancement 1-2; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 1-2.

Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13. The district court rejected that argument and sentenced petitioner to an enhanced term of 15 years' imprisonment under Section 924(e)(1). Pet. App. 7a-16a.

2. The court of appeals affirmed. Pet. App. 1a-6a. In the court of appeals, petitioner argued (Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10) that Section 924(e) did not apply to his state burglary convictions because those offenses did not involve a serious potential risk of physical injury to another. Relying on its recent decision in United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989), the court of appeals reiterated that Congress's use of the term "burglary" in Section 924(e)(2)(B)(ii) means "burglary however a state chooses to define it" (Pet. App. 3a (internal quotation marks omitted)). As the court explained, "'[a] person with * * * prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e)'" (ibid. (quoting Portwood, 857 F.2d at 1224)). Consequently, the court held, "'Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond,'" all of which "'scenarios present a grave threat of harm to persons'" (ibid. (quoting Portwood, 857 F.2d at 1224)).

Judge Bright dissented (Pet. App. 3a-6a). In his view, since Congress did not define the term "burglary" in Section 924(e), Congress must have intended to use the common law definition, i.e., "the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony" (Pet. App. 3a (internal quotation marks and citation omitted)). Since Judge Bright found that petitioner's state burglary

convictions do not fall within this common law definition and do not otherwise "involve[] conduct that presents a serious potential risk of physical injury to another" (18 U.S.C. 924(e)(2)(B)(ii)), he concluded that petitioner should not have been subjected to the enhancement provision of Section 924(e). Pet. App. 5a-6a.

ARGUMENT

In this Court, petitioner for the first time contends (Pet. 15-18) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).[5] Petitioner further contends (Pet. 10-15) that the courts of appeals have divided over the proper definition of the term "burglary" in Section 924(e)(2)(B)(ii), and that the decision below conflicts directly with recent decisions of the Fourth and Ninth Circuits. As we show below, the statutory reference to "burglary" is not limited to the common law definition of burglary. To the contrary, as the legislative history makes clear, Congress intended to retain the generic definition of burglary that was contained in the predecessor statute, the Armed Career Criminal Act of 1984, a definition that reflects the common view among the federal government and the States today, i.e., that burglary consists of the unlawful entering of a building or residence belonging to another for the purpose of committing a federal or state offense.

Accordingly, although we disagree with the reasoning of the court of appeals, petitioner's two state burglary convictions do qualify as "violent felon[ies]" under Section 924(e). Petitioner was therefore properly subjected to the sentence enhancement provision. Furthermore, although petitioner correctly points out that the courts of appeals have adopted different constructions

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[5] In the lower courts, petitioner consistently maintained that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others. See Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13; Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10; Pet. for Rehearing 3 n.2, 4-6.

of Section 924(e), we do not think that this is the appropriate case in which to resolve the conflict since petitioner failed to press in the lower courts the issue that has actually divided the circuits -- whether burglary under Section 924(e) is limited to its common law definition.

1. Petitioner contends (Pet. 15-18) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).[6] As most courts of appeals have concluded, however, the statutory reference to "burglary" is not limited to the common law definition of burglary.[7]

a. The predecessor to Section 924(e), 18 U.S.C. App. 1202 (1982 & Supp. II 1984), was enacted as part of the Armed Career Criminal Act of 1984.[8] Under that provision, anyone in possession of a firearm who had "three previous convictions * * * for robbery or burglary, or both" would be "imprisoned [for] not less than fifteen years * * *." Congress enacted the Armed Career Criminal Act in order to provide more stringent punishment for recidivists. As Senator Specter, the sponsor of the Act, explained:

> The key to the Armed Career Criminal Act is the revelation that a surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country. The statistic is startling, but the

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[6] At common law, the offense of burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.13, at 464 (1986).

[7] See, e.g., United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989), slip op. 9-20; United States v. Palmer, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); United States v. Leonard, 868 F.2d 1393, 1395-1399 (5th Cir. 1989), cert. pending, No. 88-1895; United States v. Hill, 863 F.2d 1575, 1577-1582 (11th Cir. 1989); United States v. Portwood, 857 F.2d 1221, 1223-1224 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989); but see United States v. Chatman, 869 F.2d 525, 527-530 (9th Cir. 1989) (adopting common law definition of burglary); United States v. Headspeth, 852 F.2d 753, 756-758 (4th Cir. 1988) (same).

[8] Pub. L. No. 98-473, §§ 1801-1803, 98 Stat. 2185. The Armed Career Criminal Act was itself enacted as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.

> implication is evident: by targeting our resources on this six percent we can dramatically reduce crime. This is what the * * * Act is all about * * *.

Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 17 (1984).

The statute further defined "burglary" in broad generic terms as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense" (18 U.S.C. App. 1202(c)(9) (Supp. II 1984)).[9] Senator Specter explained the inclusion of burglary as a predicate offense:

> Robberies and burglaries are the most damaging crimes to society. Robberies and burglaries occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. * * * Burglaries involve invasion of [innocent individuals'] homes or workplaces, violations of their privacy, and loss of their most personal and valued possessions. * * * Most robberies and burglaries are committed by career criminals * * * [who] often have no lawful employment; their fulltime occupation is crime for profit and many commit crimes on a daily basis. * * * Various studies also indicate that for every time a career criminal is arrested for robbery or burglary, he has probably committed 10 to 20 such crimes. Career criminals commit robberies and burglaries interchangeably.

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (citation omitted). By its terms, therefore, the broad statutory definition did not restrict "burglary" offenses to an archaic common law definition.[10]

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[9] Section 1202(c)(2), in turn, defined "felony" as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *."

[10] The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-453, 456-459 (1986), recodified 18 U.S.C. App. 1202 (1982 & Supp. II 1984), with only one minor change, as 18 U.S.C. 924(e) (Supp. IV 1986). See United States v. Headspeth, 852 F.2d at 757 n.1. Congress retained the generic definition of burglary as consisting of entering and remaining surreptitiously within a building of another to engage in conduct constituting a federal or state offense. But unlike the predecessor statute, see note 9, supra, the new provision did not distinguish from felony burglary those state misdemeanor burglary offenses punishable by a prison term of two years or less.

b. Enacted as part of the Anti-Drug Abuse Act of 1986, the "Career Criminal Amendments Act of 1986," Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40 (1986), amended Section 924(e) by including additional predicate acts, such as certain "serious drug offenses." In enlarging the category of predicate acts, the 1986 Act also eliminated Section 924(e)'s definition of "burglary." All the evidence indicates, however, that Congress intended to retain the broad definition of burglary that existed before the latest amendment to the statute.

The Career Criminal Amendments Act of 1986 evolved out of three separate bills, two of which originated in the House of Representatives and one of which arose in the Senate. The Senate bill, S. 2312, 99th Cong., 2d Sess. (1986), and its companion bill in the House, H.R. 4639, 99th Cong., 2d Sess. (1986), defined a "crime of violence" as

> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 3 (1986) (reporting text of S. 2312) [hereinafter Senate Hearing]; Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 4 (1986) (reporting text of H.R. 4639) [hereinafter House Hearing].

Senator Specter, who introduced S. 2312, understood that the bill would "broaden th[e] definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute" (House Hearing 44). On the Senate floor, Senator Specter stated that his bill would "broaden the so-called predicate crimes to include drug violations and certain other serious violent acts. This amendment would change the law by broadening the prior convictions which lead to the

classifications of being a 'career criminal.'" 132 Cong. Rec. 7697 (1986).[11]

The Senate hearings on Senator Specter's bill reveal a shared understanding that the bill would expand the scope of the Armed Career Criminal Act. No mention was made of adopting the more restrictive common law definition of burglary. Representative Wyden, the sponsor of the companion House bill, H.R. 4639, for example, explained that the Act, although successful to date, "would be much more effective if the predicate offenses were extended beyond robbery and burglary to include crimes of violence and serious drug offenses. That's precisely what the bill we recently introduced would do." Senate Hearing 6 (emphasis added); see House Hearing 10. And Deputy Assistant Attorney General Knapp observed that the Senate bill would "expand the coverage of the act" while retaining robbery and burglary as predicate offenses. Senate Hearing 9. "The term 'crime of violence' would include robberies and burglaries," he noted, "since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." Ibid.

In addition to H.R. 4639, the House considered H.R. 4768, a similar bill sponsored by Representatives Hughes and McCollum that also expanded the predicate offenses for the Armed Career Criminal Act. Like H.R. 4639, the Hughes/McCollum bill expanded the predicate crimes by introducing the two broad categories of "violent felony or a serious drug offense." That bill defined "violent felony" as "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." House Hearing 6. On its

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[11] Senator Specter also entered into the Congressional Record a letter from the Department of Justice, expressing the Department's understanding that the proposed amendment would expand the coverage of the Armed Career Criminal Act beyond (but still including) robbery and burglary. See Letter from Assistant Attorney General John R. Bolton to Senator Arlen Specter (Mar. 18, 1986), quoted in 132 Cong. Rec. 7698 (1986).

face, this bill appeared to focus on the actual use of force against the person of another. The House hearings, however, show that the bill's sponsors understood that its purpose, like that of the Senate bill and its House companion, was "to expand [the Armed Career Criminal Act], which now covers burglary and robbery, to include other serious violent crimes." House Hearing 7 (remarks of Rep. McCollum).

Deputy Assistant Attorney General Knapp also testified at the House hearings and reiterated the Justice Department's view that "one of the critical standard categories involve[s] people with a long history of burglary convictions, because in fact your typical career criminal is most likely to be a burglar * * *. That is probably the No. 1 professional crime." House Hearing 26. He also commented that

> even though injury is not an element of [burglary], it is a potentially very dangerous offense, because when you take your very typical residential burglary or even your professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises. Many crimes of violence do occur in the course of committing a burglary. It is something which is clearly a foreseeable risk, and for that reason is always included in any typical felony murder statute.

House Hearing 26.

Deputy Assistant Attorney General Knapp and others expressed concern that H.R. 4768, as drafted, did not necessarily include property crimes such as burglary in its definition of "violent felony," since that definition limited "violent felony" to offenses involving "use of physical force against the person of another" (H.R. 4768, 99th Cong., 2d Sess. (1986), quoted at Housing Hearing 6); see House Hearing 15. But Representative Hughes, the Chairman of the House Subcommittee on Crime, responded to those concerns at the conclusion of the hearings:

> Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included. burglaries.
>
> My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. That triggers Federal jurisdiction to begin with. So we are not talking

> about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.

House Hearing 41. The other members of the Subcommittee concurred in this view, and agreed to "develop some language to do that" (ibid.).

As a result of the hearings, the House Subcommittee on Crime ultimately reported out a clean bill, H.R. 4885, 99th Cong., 2d Sess. (1986). See H.R. Rep. No. 849, 99th Cong., 2d Sess. 6-7 (1986). H.R. 4885 provided in relevant part:

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. Rep. No. 849, supra, at 7. Subsection (B)(ii) presumably is the language the House Subcommittee "develop[ed]" to cover burglary as it was defined in "the existing statute" (House Hearing 41).

The report of the House Judiciary Committee accompanying H.R. 4885 confirms this point. Indeed, that report makes clear that the bill's principal purpose was to expand the reach of the Armed Career Criminal Act; the report clearly contemplated that the proposed amendments would continue to cover those burglaries included within the ambit of the predecessor statute. As the House Judiciary Committee explained:

> The Subcommittee on Crime held a hearing on May 21, 1986 to consider whether it should expand the predicate offenses (robbery and burglary) in existing law in order to add to its effectiveness. At this hearing a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally. This concept was encompassed in H.R. 4885 by deleting the specific predicate offenses for robbery and burglary and adding as predicate offenses State and Federal laws for which a maximum term of imprisonment of 10 years or more is prescribed for [certain drug offenses] and violent felonies under Federal or State law if the offense has [as] an element the use, attempted use or threatened use of physical force against a [person]. * * *
>
> The other major question involved in these hearings was as to what violent felonies involving physical force against [property] should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 849, supra, at 3 (emphases added).

c. In sum, Congress intended that burglary, as defined under the predecessor Armed Career Criminal Act, would continue to serve as a predicate offense. And to eliminate any confusion in this regard, Congress inserted the term "burglary" into the definition of "violent felony" before passing the Anti-Drug Abuse Act of 1986. See Section 924(e)(2)(B)(ii); 132 Cong. Record H9495 (daily ed. Oct. 8, 1986).

Contrary to petitioner's contention (Pet. 15-18), the legislative history, as detailed above, does not suggest that Congress restricted the definition of "burglary" to its common law definition. Instead, it makes clear that "Congress intended that any burglary that would have met the definition of burglary under the previous act would fall within the meaning of burglary" under the amended statute. United States v. Hill, 863 F.2d 1575, 1582 (11th Cir. 1989).

Here, petitioner's state burglary convictions qualify as predicate offenses under Section 924(e), since those crimes necessarily involved entering or remaining surreptitiously within a building of another with the intent to commit a federal or state offense. See Mo. Rev. Stat. § 569.170 (1979); note 1, supra. Accordingly, petitioner was properly sentenced under the enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).

2. Petitioner correctly points out (Pet. 10-15) that the courts of appeals have adopted different constructions of Section 924(e). The actual conflict, however, does not concern the issue petitioner pressed before the district court and the court of appeals, namely, whether Section 924(e) applies only to burglaries that pose a potential risk of physical injury.

Rather, the courts have disagreed over the separate issue whether the statute includes only those burglaries that would be treated as such under common law, i.e., the "breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, Substantive Criminal Law, § 8.13, at 464 (1986).

a. To date, three courts of appeals have agreed with our position that Congress fully intended to retain in the Career Criminal Amendments Act of 1986 the broad definition of burglary that was contained in the original version of Section 924(e). In so concluding, those courts have rejected the view that the statutory reference to "burglary" is limited to the common law definition of that crime. United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989), slip op. 19-20; United States v. Palmer, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); United States v. Hill, 863 F.2d at 1582. Thus, after surveying the legislative history detailed above, the Eleventh Circuit correctly noted that "the purpose of the 1986 amendments to section 924(e) was to expand the predicate offenses, not restrict them." United States v. Hill, 863 F.2d at 1581; see United States v. Palmer, 871 F.2d at 1208. Those three circuits have consequently held that "the term 'burglary' must be given the generic definition that explicitly existed prior to its amendment." United States v. Palmer, 871 F.2d at 1208; accord United States v. Dombrowski, slip op. 19-20 ("we think [Congress's] intent was to carry forward the prior definition -- even if not explicitly stated"); United States v. Hill, 863 F.2d at 1582.[12]

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[12] As the Eleventh Circuit correctly noted, "even if the legislative history were not as clear as we believe it to be, [the court] would be reluctant to conclude that Congress intended to use a definition of burglary that has become an anachronism." United States v. Hill, 863 F.2d at 1582. When a common law term has evolved beyond its common law meaning, courts should apply the "ordinary, contemporary, common meaning," and not the antiquated notions of early common law. Perrin v. United States, 444 U.S. 37, 42 (1979) (bribery under Travel Act, 18 U.S.C. 1952, not confined to common law definition). Thus, in concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the [statute's] coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. United States, 462 U.S. 356, 362 (1983); see also Burns v. Alcala, 420 U.S. 575, 580-581 (1975).

Missouri and the vast majority of other States have long since abandoned the strict common law definition in their burglary statutes. See United States v. Hill, 863 F.2d at 1582 n.5 (noting that only five of 36 States surveyed retained common law definition of burglary). The Model Penal Code reflects this development, defining burglary as follows:

> A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code § 221.1 (Proposed Official Draft 1962). Indeed, as one commentator has noted, "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Note, Statutory Burglary -- The Magic of Four Walls and a Roof, 100 U. Pa. L. Rev. 411 (1951). Moreover, specific statutes creating federal crimes of burglary, such as 18 U.S.C. 2113(b) and 18 U.S.C. 2118(b) (Supp. V 1987), do not restrict the offense to its common law boundaries. Accordingly, it defies both logic and common sense to attribute to Congress an intent to adopt a common law concept that has been rejected by virtually every State and by Congress in Title 18 as well.

b. Joining the Third, Seventh, and Eleventh Circuits, the court of appeals here concluded that the statutory reference to "burglary" is not limited to the common law definition of burglary (Pet. App. 2a-3a (citing United States v. Portwood, 857 F.2d at 1223-1224)). But in rejecting the strict common law definition, the Eighth Circuit appears to have articulated a different construction of Section 924(e). It has concluded that the statute applies to any felony defined as "burglary" under state law. See Pet. App. 3a; United States v. Leonard, 868 F.2d 1393, 1398 (5th Cir. 1989) ("a conviction for a crime which the state denominates 'burglary' is a conviction within the meaning of § 924(e)(2)(B)(ii)"), cert. pending, No. 88-1885. To the extent the Fifth and Eighth Circuits expand the definition of Section 924(e) beyond that contained in the predecessor statute and suggest that the previous federal definition of burglary contained in the Firearms Owners' Protection Act and the Armed Career Criminal Act of 1984 does not control, we disagree for the

reasons stated above (see pp. 5-11, supra). Nevertheless, it is clear that petitioner's burglary convictions qualify as predicate crimes under the rationale espoused by the Fifth and Eighth Circuits.

In addition, neither the Eighth Circuit here nor the Fifth Circuit has expressly rejected the position that Section 924(e) incorporates its predecessors' definition of burglary. Indeed, the state burglary statutes actually followed in these cases are entirely consistent with the federal definition of burglary contained in the Armed Career Criminal Act and the Firearms Owners' Protection Act (see p. 6 & nn.9-10, supra). See Pet. App. 3a (burglaries of "building or inhabitable structure," Mo. Rev. Stat. § 569.170 (1979)); United States v. Leonard, 868 F.2d at 1395 & n.2 (burglaries of "habitation" and "building," Tex. Penal Code Ann. § 30.02 (Vernon 1974)). For those reasons, as well as for the reason that petitioner does not even raise the issue, this case is not a suitable vehicle for resolving that apparent inconsistency among the courts of appeals.[13]

c. On the other hand, the Fourth and Ninth Circuits have concluded that Section 924(e) includes only those burglaries that meet the strict common law definition. United States v. Chatman, 869 F.2d 525 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988). In our view, those decisions have misconstrued Congress's intent when it reinserted the predicate offense of "burglary" in Section 924(e).

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[13] In United States v. Patterson, No. 88-1497 (Apr. 26, 1989), vacated on other grounds (1st Cir. May 17, 1989), the First Circuit declined to apply the former generic definition of burglary to determine whether two breaking and entering convictions under Massachusetts state law qualified as "violent felon[ies]" under Section 924(e). The court of appeals stated that "[w]e frankly cannot divine how Congress intended to define burglary," but then added that "[t]he deliberate omission of the 1984 definition effectively nullifies the intent of Congress, exposed in the legislative history, to define burglary in broad generic terms" (slip op. 12). For the reasons set forth above (see pp. 5-11, supra), we disagree with the First Circuit's analysis of Section 924(e). Nevertheless, in Patterson the First Circuit ultimately held that the Massachusetts breaking and entering convictions fell within Section 924(e)(2)(B)(ii)'s catch-all phrase defining violent felony as any "conduct that presents a serious potential risk of physical injury to another." See slip op. 12-13.

Both the Ninth and the Fourth Circuits have misread the pertinent legislative history, placing determinative weight on the fact that one of the House bills, H.R. 4768, limited the definition of "violent felony" to crimes involving "the use, attempted use, or threatened use of physical force against the person of another." See United States v. Chatman, 869 F.2d at 527-528; United States v. Headspeth, 852 F.2d at 757-758. But both courts of appeals have ignored the fact that the sponsor of H.R. 4768 determined at the conclusion of the hearings that "burglary," as previously defined, should be retained as a predicate offense. Indeed, the members of the Subcommittee on Crime specifically agreed to "develop some language" to do so (House Hearing 41), an express determination noted in the House Judiciary Committee's report on the final House bill, H.R. 4885. See H.R. Rep. No. 849, supra, at 2-3, 5; United States v. Dombrowski, slip op. 17.

3. As petitioner correctly points out (Pet. 13-15), the court of appeals' decision, together with the other circuits' decisions described above, squarely conflict with the construction of Section 924(e) adopted by both the Fourth and Ninth Circuits. Nevertheless, this case is not an appropriate vehicle for the Court to resolve the issue on which the lower courts are divided.

Petitioner did not base his argument in the court of appeals on the issue that has divided the circuits. Petitioner did not argue that his burglary convictions should not be counted against him because those crimes do not fall within the common law definition of "burglary." Instead, in both the district court and the court of appeals, petitioner argued that Section 924(e) applies only to burglaries that pose a potential risk of physical injury. See Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13; Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10. But no court of appeals has agreed with that reading of the statute. And although petitioner cited below the Fourth Circuit's decision in

Headspeth, he in fact specifically disavowed that court's view that Section 924(e) applies only to those buglaries that fit the common law definition. See Pet. C.A. Reply Br. 4; see also Pet. for Rehearing 5.[14] As a result, petitioner failed to press below the only issue under Section 924(e) on which the courts of appeals are divided.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] To be sure, petitioner did suggest before the court of appeals that his convictions for second degree burglary under Missouri state law would not have been treated as burglaries under common law. Pet. C.A. Br. 5 n.3. Petitioner made clear, however, that this statement was part of his argument that under Section 924(e), the burglary offense must involve a potential risk of physical injury to a person. See Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 4-9.

[15] Carter v. United States, No. 88-7307, squarely raises the issue that has divided the lower courts, i.e., whether Section 924(e) includes only those burglaries that would be treated as such under common law. Since that case is an appropriate vehicle to resolve the conflict, the United States has agreed with petitioner in Carter that the Court should grant certiorari.